

1 ELIZABETH A. STRANGE
2 First Assistant United States Attorney
3 District of Arizona

4 KEVIN M. RAPP (Ariz. Bar No. 14249, kevin.rapp@usdoj.gov)
5 MARGARET PERLMETER (Ariz. Bar No. 024805, margaret.perlmeter@usdoj.gov)
6 PETER S. KOZINETS (Ariz. Bar No. 019856, peter.kozinets@usdoj.gov)
7 ANDREW C. STONE (Ariz. Bar No. 026543, andrew.stone@usdoj.gov)
JOHN J. KUCERA (Cal. Bar No. 274184, john.kucera@usdoj.gov)
Assistant U.S. Attorneys
40 N. Central Avenue, Suite 1800
Phoenix, Arizona 85004-4408
Telephone (602) 514-7500

8 BRIAN BENCZKOWSKI
9 Assistant Attorney General
Criminal Division, U.S. Department of Justice

10 REGINALD E. JONES (Miss. Bar No. 102806, reginald.jones4@usdoj.gov)
11 Senior Trial Attorney, U.S. Department of Justice
Child Exploitation and Obscenity Section
12 950 Pennsylvania Ave N.W., Room 2116
Washington, D.C. 20530
Telephone (202) 616-2807
13 Attorneys for Plaintiff

14 IN THE UNITED STATES DISTRICT COURT
15 FOR THE DISTRICT OF ARIZONA

17 UNITED STATES OF AMERICA,

18 PLAINTIFF,

19 V.

21 MICHAEL LACEY, ET AL.,

22 DEFENDANTS.

No. CR-18-00422-PHX-SPL

**GOVERNMENT'S RESPONSE IN
OPPOSITION TO DEFENDANT'S
MOTION TO STRIKE (Doc. 415)**

24 Plaintiff United States of America (the "Government"), by and through its counsel
25 of record, the United States Attorney's Office for the District of Arizona and Special
26 Assistant United States Attorney John J. Kucera, requests that this Court deny Michael
27 Lacey's ("Defendant") Motion to Strike and Request for Expedited Relief (Dkt. 415
28 ("Motion to Strike")), because Defendant's Motion for Release of Funds and Request for

1 Expedited Relief (Dkt. 385 (“Motion for Release”)) constituted a Rule 41(g) motion¹,
 2 which is treated as a civil complaint pursuant to Federal Rules of Civil Procedure and
 3 affords the Government 60 days to respond. In the alternative, should this Court find that
 4 Arizona’s Local Rules apply, the Government is afforded 30 days to respond pursuant to
 5 Local Rule 56.1(d). Either way, the Government’s filing (on December 11, 2018) of its
 6 Response in Opposition to Defendant’s Motion for Release (Dkt. 412 (“Response”)) was
 7 within the statutory timeframe.

8 Even if this was not a Rule 41(g) motion, the Government understood that this
 9 Court’s November 16, 2018, ruling encompassed Defendant’s Motion for Release, given
 10 (1) the similarities of relief requested addressed in that hearing, (2) the connection between
 11 the motions subject to that hearing and the relief sought in Defendant’s Motion for Release,
 12 and (3) the timing of the Defendant’s Motion for Release in connection with said hearing.

13 Finally, Defendant has not claimed any prejudice as a result of any delay, and the
 14 Government satisfies the requirements outlined under the “excusable neglect” doctrine.

15 In support, the Government states as follows:

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

16 On November 16, 2018, at an “Emergency Hearing,” this Court reviewed and
 17 addressed almost the exact same issues and concerns raised by Defendant’s “Supplemental
 18 Brief” in support of defendants’ Emergency Motion to Stay Seizure of Attorney Fees and
 19 Request for an Immediate Hearing (Dkt. 377 (“Supplemental Brief”)). In his Supplemental
 20 Brief, Defendant alleged that the seizure of funds was improper because, among other
 21 things, the seizure restrained funds unrelated to the criminal allegations contained in the
 22 Indictment and First Superseding Indictment. In addition, Defendant alleged the seizure left
 23 Defendant without sufficient funds to afford his counsel of choice. (*See* Supplemental Brief,
 24
 25
 26

27 ¹ In its Response, the Government pointed out that Defendant’s Rule 41(g) motion is
 28 improper here because this Court lacks jurisdiction to grant such a motion when a related
 civil forfeiture proceeding is pending.

1 p. 2). Because the Supplemental Brief was filed one-day prior to the Emergency Hearing,
 2 the Court agreed to accept the Government's Response as applicable to the Supplemental
 3 Brief (*See Transcript*, pp. 51 – 52).

4 Also on the date of the Emergency Hearing, Defendant filed his Motion for Release.
 5 Because this motion sought the return of property held by the Government, the Motion for
 6 Release is properly construed as one arising under Rule 41(g), which are treated as civil
 7 complaints. As such, the Government has 60 days from the date of filing to respond.
 8 Despite this, on December 3, 2018, Defendant filed a Notice of the Government's Non-
 9 Opposition to Defendant Lacey's Motion for Release of Funds ("Notice"). In his Notice,
 10 Defendant alleged the Government failed to respond to/oppose his Motion for Release
 11 within the 14-day response period as prescribed by Local Rules 7.2(c) and (i). In this way,
 12 Defendant incorrectly construes his Motion for Release as a memorandum governed by
 13 Local Rule 7.2(c). This is incorrect and ignores well-established case law regarding motions
 14 for release of funds.

15 On December 11, 2018, the Government filed its Response, and pursuant to the 60-
 16 day response period prescribed to Rule 41(g) motions (or, in the alternative, pursuant to the
 17 30-day response period pursuant to the Local Rules), the Government filed its response well
 18 within the statutory time period permitted under both the Federal Rules of Civil Procedure
 19 and the Local Rules under 56.1(d).

20 **II. DEFENDANTS' MOTION FOR RELEASE CONSTITUTED A RULE 41(g)
 21 MOTION, AFFORDING THE GOVERNMENT 60 DAYS TO RESPOND**

22 Rule 41(g) of the Federal Rules of Criminal Procedure provides, in pertinent part,
 23 that "[a] person aggrieved ... by the deprivation of property may move for the property's
 24 return" Fed. R. Crim. Proc. 41(g).² In *Ladele v. United States*, No. CR 06-00125

26 ² "The 2002 amendments redesignated the subsection on motions for return of property
 27 from Rule 41(e) to Rule 41(g) without substantive change to the Rule, and courts have
 28 applied case law concerning former Rule 41(e) to the current Rule 41(g)." Wright, King,
 Klein & Welling, Motion to Return Property, 3A Fed. Prac. & Proc. Crim., 3d § 673 n.32
 (4th ed.); see also *United States v. Gotti*, 244 F. Supp. 2d 120, 122-24 (E.D.N.Y. 2003);
De Almeida v. United States, 459 F.3d 377, 308 n.2 (2d Cir. 2006).

1 MMM, 2010 WL 476957, at *6 (C.D. Cal. Feb. 2, 2010), the Central District of California
 2 (“CDCA”), in addressing the issue of a pending related criminal matter, held that because
 3 “the government claims the property sought was already the subject of an administrative
 4 foreclosure proceeding, the court must convert the government’s opposition into a motion
 5 for summary judgement” *Id.* (treating movant’s Rule 41(g) motion as a civil complaint).
 6 This holding equally applies when the defendant assets are subject to a related civil
 7 forfeiture proceeding. *See United States v. Williams*, 267 F. Supp. 2d 1130, 1138 (M.D.
 8 Ala. 2003) (motion for return of seized property denied, despite finding of lack of probable
 9 cause and granting of motion to suppress, because property is restrained in a criminal case
 10 under 21 U.S.C. § 853(e)(1) and an civil forfeiture complaint was filed under 18 U.S.C. §
 11 983(a)(3)(B)(ii)(II)).

12 There is no dispute that the defendant assets in this criminal proceeding are also
 13 subject to a related civil forfeiture proceeding. On November 16, 2018, in CDCA, the
 14 Government filed its civil forfeiture complaint seeking to forfeit the assets Defendant now
 15 seeks to have returned (*see U.S. v. \$689,884.48 Seized from First Federal Savings & Loan*
 16 *of San Rafael Account ‘3620, et al.*, 18-cv-8597). As such, defendants’ Motion for Release
 17 should be treated as a civil complaint. No case law suggests otherwise, and Defendant does
 18 not argue to the contrary.

19 Because Defendant’s Motion for Release constitutes a Rule 41(g) motion, the
 20 Government has 60 days from the date of Defendant’s Motion for Release filing to respond
 21 pursuant to Rule 12(a) under the Federal Rules of Civil Procedure. *See United States v.*
 22 *Ritchie*, 342 F.3d 903, 906 (9th Cir. 2003) (holding that the district court properly treated
 23 the government’s opposition to a Rule 41(g) motion as the equivalent of a 12(b)(6) motion
 24 to dismiss); *United States v. Ibrahim*, 522 F.3d 1003, 1007 (9th Cir. 2008) (same). In *Vega*
 25 *v. United States*, No. 00-8920, 2001 WL 823874, at *1 (S.D.N.Y. July 20, 2001), the court
 26 held that “because petitioner’s filing must be construed as a complaint, the Court construes
 27 the Government’s Letter [a response] as a motion to dismiss, pursuant to Fed. R. Civ. P.
 28 12(b)(6).” *Id.* at 1. Thus, the Government’s response here operates as a motion to dismiss,

1 even if not labeled as such. Defendant's Motion for Release was filed on November 16,
 2 2018, giving the Government until Tuesday, January 15, 2019, to submit its response.

3 III. GOVERNMENT'S COMPLIED WITH ARIZONA'S LOCAL RULES

4 Should this Court find that Defendant's Motion for Release did not fall under the
 5 Federal Rules of Civil Procedure, it should nevertheless allow the Government to submit its
 6 Response in Opposition because it substantially complied and conformed with all
 7 substantial respects to the requirements set forth under Local Rules 7.2(c) and 7.2(i).

8 When a responsive memorandum is filed in this District, Arizona's Local Rules
 9 require that “[t]he opposing party shall, unless otherwise ordered by the Court and **except**
 10 **otherwise provided by Rule 56** of the Federal Rules of Civil Procedure, and Rules 12.1
 11 and **56.1, Local Rules of Civil Procedure**, have fourteen (14) days after service in a civil
 12 or criminal case with which to serve and file a responsive memorandum.” LRCiv 7.2(c)
 13 (emphasis added). And “[i]f a motion does not conform in all **substantial** respects with the
 14 requirements of this Local Rule, or if the unrepresented party or counsel does not serve and
 15 file the required answering memoranda … such non-compliance may be deemed a consent
 16 to the denial or granting of the motion and the Court may dispose of the motion summarily.”
 17 LRCiv 7.2(i) (emphasis added).

18 Here, the Government did, in fact, serve and file the required answering
 19 memorandum and substantially complied with the requirements set forth under Local Rules
 20 7.2(c) and (i). Applying the Local Rules, because Defendant's Motion for Release
 21 constitutes a Rule 41(g) motion, the Government is well within the response deadline
 22 pursuant to Local Rule 56.1(d). This is because a response to a Rule 41(g) motion proceeds
 23 under Rule 12(a) of the Federal Rules of Civil Procedure (*see* Section I above for supporting
 24 case law).

25 Rule 56.1(d) of Arizona's Local Rules governs deadlines for responsive and reply
 26 memoranda. *See* LRCiv 56.1(d). The rule states, in pertinent part, “[n]otwithstanding the
 27 provisions of Rule 7.2(c), (d), and (f), Local Rules of Civil Procedure, the opposing party
 28 may, unless ordered by the Court, have **thirty (30) days** after service within which to serve

1 and file a responsive memorandum in opposition” *Id.* (emphasis added). Defendant’s
 2 Motion for Release was filed on November 16, 2018, affording the Government until
 3 December 16, 2018, to submit its response. Pursuant to the District of Arizona’s Local Rule
 4 56.1(d), the Government’s response to Defendant’s Rule 41(g) motion was within the
 5 timeframe to respond to Defendant’s Motion for Release.

6 Even if this Court finds the Motion for Release was not a Rule 41(g) motion, as
 7 explained above in Section II, the Government had good reason to believe that it had a
 8 significant time to submit its response based on the belief that defendants’ Motion for
 9 Release constituted a Rule 41(g) motion. There was no intent on the Government’s part to
 10 act in bad faith or otherwise mislead this Court and the opposition. More importantly, at the
 11 time of this writing, the Court has yet to decide on the defendants’ Motion for Release. As
 12 such, Defendants cannot claim to have been prejudice by the Government’s timing.

13 **IV. GOVERNMENT’S FAILURE TO RESPOND CONSTITUTES EXCUSIBLE 14 NEGLECT**

15 In the alternative, should this Court find that Defendant’s Motion for Release did not
 16 constitute a Rule 41(g) motion, the Government should, nevertheless, be excused for this
 17 late filing because the Government’s failure to respond amounted to excusable neglect.

18 Rule 6(b)(1)(B) of the Federal Rules of Civil Procedure allows for the extension of
 19 time where “on a motion made after the time has expired if the party failed to act because
 20 of excusable neglect.” Fed. R. Criv. Proc. 41(g).³ “Congress plainly contemplated that the
 21 courts would be permitted to accept late filings caused by inadvertence, mistake, or
 22 carelessness, not just those caused by intervening circumstances beyond the party’s control.
 23 This flexible understanding comports with the ordinary meaning of ‘neglect.’” *Pioneer Inv.*
 24 *Servs. Co. v. Brunswick Assocs. Ltd. P’ship*, 507 U.S. 380. 381 (1993) (applying the
 25 excusable neglect doctrine in a bankruptcy matter) (“*Pioneer*”). This Court has applied the
 26 same standard. *Vitasek v. Maricopa Cty. Sheriff’s Office*, No. CV 10-1777-PHX-RCB, 2012

27
 28 ³ The Government responds to defendants’ Motion to Strike, which is governed by Rule
 12(f) of the Federal Rules of Civil Procedure.

1 WL 176313, at *2 (D. Ariz. Jan. 23, 2012) (finding that “inadvertence or carelessness
 2 generally constitute excusable neglect”).

3 To this end, “[t]he Ninth Circuit dictates that a district court must apply a four-factor
 4 equitable test to determine if a party’s failure to meet a deadline constitutes ‘excusable
 5 neglect.’” *McSmith v. Poker Prods.*, No. 2:10-CV-00870-GMN, 2011 WL 841350, at *2
 6 (D. Nev. Mar. 7, 2011) (quoting *Ahanchian v. Xenon Pictures, Inc.*, 624 F.3d 1253, 1261
 7 (9th Cir. 2010) (“Ahanchian”)) (“*McSmith*”). The four factors district courts must consider
 8 are: “(1) the danger of prejudice to the opposing party; (2) the length of the delay and its
 9 potential impact on the proceedings; (3) the reason for the delay; and (4) whether the movant
 10 acted in good faith.” *Ahanchian*, 624 F.3d at 1261; *see McSmith*, 2011 WL at *2; *Pioneer*,
 11 507 U.S. at 395.

12 Here, any neglect by government counsel was excusable. Defendants did not, and
 13 has not, suffered any prejudice as a result of any late filing.⁴ This is evident in their Motion
 14 to Strike, in which Defendant did not assert any such claim. In addition, this case is in its
 15 early stages of litigation and any prejudice on defendants to further defend this suit is no
 16 more greater as a result of serval days delay. *See McSmith*, 2011 WL at *3 (finding
 17 excusable neglect despite a two month delay). Like *McSmith*, in this case, no discovery has
 18 commenced and this Court has yet to rule on Defendant’s Motion for Release. As such,
 19 there is no noticeable impact on the current proceedings. *See id.*

20 The Government’s Response also relies upon this Court’s November 16, 2018,
 21 ruling, when the Court reviewed and addressed nearly identical issues and concerns raised
 22 in the Supplemental Brief. The Motion for Release does not present any new or substantially
 23 different evidence, but merely rehashes already decided issues. Given the nature and
 24 circumstances surrounding the Court’s November 16 ruling, the Government reasonably
 25 believed that the Court’s ruling resolved the issues presented by the Motion for Release.
 26

27 ⁴ Although Defendant claims to have been prejudiced by the seizure in the first place,
 28 Defendant does not argue to have suffered any prejudice as a result of any untimely
 Response.

1 Finally, even if this Court were to find the Government did err in this filing, given
2 the complexity of this matter (as this Court can appreciate) the Government's failure to
3 respond here amounted to a simple oversight, and any late filing of the Opposition Motion
4 constituted—at most—an inadvertent error, amounting to excusable neglect.

5 **V. CONCLUSION**

6 For the forgoing reasons, the Government respectfully requests this Court to deny
7 Defendant's Motion to Strike.

8 Respectfully submitted, December 14, 2018.
9

10 ELIZABETH A. STRANGE
11 First Assistant United States Attorney
12 District of Arizona

13 BRIAN BENCZKOWSKI
14 Assistant Attorney General
15 U.S. Department of Justice
16 Criminal Division, U.S. Department of Justice

17 KEVIN RAPP
18 MARGARET PERLMETER
19 ANDREW STONE
20 PETER KOZINETS
21 Assistant United States Attorneys

22 REGINALD E. JONES
23 Senior Trial Attorney

24 *s/John J. Kucera*
25

26 JOHN J. KUCERA
27 Special Assistant United States Attorney
28

29 Attorneys for Plaintiff
30 UNITED STATES OF AMERICA
31

1
2 **CERTIFICATE OF SERVICE**
3

4 I hereby certify that on this 14th day of December 2018, I electronically transmitted
5 the attached document to the Clerk's Office using the CM/ECF System for filing and
6 transmittal of a Notice of Electronic Filing to the following CM/ECF registrant:
7 Anne Chapman, Erin McCampbell, Gregory Zamora, James Grant, Lee Stein, Paul
8 Cambria, Robert Corn-Revere, Ronald London, Janey Henze Cook, John Littrell, Kenneth
9 Miller, Thomas Bienart, Jr., Bruce Feder, Michael Kimerer, Rhonda Neff, KC Maxwell,
10 Michael Piccarreta, Stephen Weiss, Gopi Panchapakesan, Ariel Neuman, Gary
11 Lincenberg, Anthony Bisconti, Whitney Bernstein, Seetha Ramachandran.
12

13 _____
14 *s/S. Beckman*
15 U.S. Attorney's Office
16
17
18
19
20
21
22
23
24
25
26
27
28